

2005 DRAFTING REQUEST

Bill

Received: 10/22/2004

Received By: **mdsida**

Wanted: **As time permits**

Identical to LRB:

For: **Sheldon Wasserman (608) 266-7671**

By/Representing: **Sarah**

This file may be shown to any legislator: **NO**

Drafter: **mdsida**

May Contact:

Addl. Drafters:

Subject: **Correctional System - prisons**

Extra Copies: **gmm**

Submit via email: **YES**

Requester's email: **Rep.Wasserman@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Inmate and resident mortality board

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mdsida 04/08/2005	wjackson 04/25/2005					S&L
/1			jfrantze 04/26/2005		lemery 04/26/2005	mbarman 05/18/2005	

FE Sent For:

<END>

→ At Intro.

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/?	mdsida	1 wj 4/23	8/4/25	8/4/25			

FE Sent For:

<END>

Nelson, Robert P.

From: Osterberg, Sarah
Sent: Thursday, October 21, 2004 4:54 PM
To: Nelson, Robert P.
Subject: wasserman redraft request

Hi, Bob,

Please redraft Assembly Sub Amendment 1 to AB 152 and amendments 1-4 to the sub as a new bill for next session.

Thanks!

Sarah

Dsida, Michael

From: Osterberg, Sarah
Sent: Thursday, October 28, 2004 3:57 PM
To: Dsida, Michael
Subject: RE: Additional points regarding review of inmate deaths

hi, mike,

here are the answers to your questions:

- 1.) No. (I don't believe that juveniles are housed out-of-state. *11/8 p/c to DOJ*)
- 2.) Yes.
- 3.) Go ahead...no problem. Call Bob Margolies.
- 4.) Only if there is a precedent...there was a concern last session about court case proceedings being interfered with.
- 5.) Sure.
- 6.) Not sure on this one. Give me a call.

Thanks!

*p/c to Sarah -
Open Records Law not
apply in circumstances
governed by AAI*

-----Original Message-----

From: Dsida, Michael
Sent: Wednesday, October 27, 2004 3:08 PM
To: Osterberg, Sarah
Subject: Additional points regarding review of inmate deaths

Besides the question I left on your voicemail regarding the "next scheduled meeting":

1. In last year's sub, you expanded the scope of s. 979.025 (which requires autopsies for people who die in in-state or out-of-state prisons) to cover, among others, juveniles in secured correctional facilities. That change, however, did not cover juveniles who are placed in secure facilities in other states. Should it have? (I don't know how often juveniles are placed in out-of-state facilities, so I don't know how many individuals that change would cover.)
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3. At the time the sub was drafted, DOC may not have been covered by federal HIPAA requirements regarding the disclosure of health care information. If it is not now covered, it may be covered soon. Would you mind if I contacted DOC to ask its views about how HIPAA affects the bill?
4. Assembly Amendment 4 did not specify whether the preliminary investigation is subject to the Open Records Law. Should it?
5. Is this change (page 6, line 10) okay?

The board may also refer concerns or recommendations to the department related to the performance of staff or work rule, including violations regarding by staff who did not follow of departmental policies or procedures related to the circumstances surrounding the death.

6. Under current s. 979.04 (3), the district attorney may request the coroner or the M.E. to conduct a preliminary investigation into a death. The bill does not specifically authorize the Attorney General to make that request. Should it? I realize that the cases in which the AG is involved are ones in which an autopsy would already have been conducted. But the examination contemplated by sub. (3) appears to be different from the autopsy.

Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@legis.state.wi.us

Conv w/ DAK

S. 146.82(2)(b) has an implicit exception
~~for~~ that allows a ^{redisclosure} if it ~~and~~ have
been permitted in the 1st place under par. (a)

CORRESPONDENCE/MEMORANDUM

DEPARTMENT OF JUSTICE

Date: March 9, 2005

To: Michael Dsida
Legislative Reference Bureau

From: Mary E. Burke
Assistant Attorney General

Subject: Comments on LRBs0090/3 (2003-04 Legislature)

You have asked for comments on LRBs0090/3, creating a board to review and make recommendations regarding deaths at correctional institutions. Specifically, you ask how HIPAA may affect health information disclosures proposed in LRBs0090/3. Because of the inexact fit between HIPAA and existing Wisconsin law, which sometimes preempts HIPAA, I also comment below on some related aspects of Wisconsin law.

In case it had not previously come to your attention, let me first mention the Committee on Inmate/Youth Deaths created by Department of Corrections Executive Directive 58 and Department of Corrections Internal Management Procedure DOC 300 IMP 13. It appears that activities of the Inmate and Resident Mortality Board proposed in LRBs0090/3 would overlap to some extent with DOC's existing Committee on Inmate/Youth Deaths. If you would like further information about the Committee on Inmate/Youth Deaths, I suggest contacting DOC Chief Legal Counsel Kevin Potter at 240-5035.

Regarding LRBs0090/3, I don't see provisions for release of "treatment records" pursuant to Wis. Stat. § 51.30 for purposes of new Wis. Stat. § 979.028. There may be cases when treatment records would be included in the conceptually broad scope of records the draft would make available to the board (*e.g.* "all medical and prison records," page 4, line 24; board may review records "in custody of any medical provider," page 5, lines 17-18). The same is true of other types of records excepted from the Wis. Stat. § 146.81(4) definition of "patient health care records," although perhaps to a lesser extent.

I note use of the term "medical records" throughout the draft (*e.g.*, page 4, line 24). Existing Wisconsin statutes concerning record confidentiality use different terminology, primarily "patient health care records" (Wis. Stat. § 146.81(4)) and "treatment records" (Wis. Stat. § 51.30(1)(b)). HIPAA uses a different set of terminology: "individually identifiable health information" (45 C.F.R. § 160.103), "protected health information" (45 C.F.R. § 160.103) ("PHI") and "psychotherapy notes" (45 C.F.R. 164.501). Differences between the existing Wisconsin and HIPAA definitions already complicate analysis of records confidentiality issues. I suggest that LRBs0090/3 avoid use of yet another set of terminology, or at least provide a definition of "medical records" relating that term to existing Wisconsin terminology.

The health information disclosures contemplated by LRBs0090/3 must comply with both state law and HIPAA. HIPAA privacy provisions apply to PHI of deceased individuals. 45 C.F.R. § 164.502(f).

New Wis. Stat. § 146.82(2)(a)22. would allow release of "patient health care records" to members of the board. Several different HIPAA confidentiality exceptions could be read to permit this contemplated disclosure.

- HIPAA permits disclosures of PHI for purposes of a covered entity's (such as a health care provider) own health care operations. 45 C.F.R. § 164.506(a) and (c)(1). "Health care operations" include activities such as conducting quality assessment and improvement activities, reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, and conducting or arranging for medical review or auditing services. 45 C.F.R. § 164.501. Disclosures for purposes of a covered entity's health care operations are subject to the "minimum necessary" standard imposed by 45 C.F.R. § 164.502(b)(1) ("a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request"). *Cf.* 45 C.F.R. § 164.502(b)(2).
- HIPAA permits disclosures of PHI required by law. 45 C.F.R. § 164.512(a). Disclosures required by law are not subject to the "minimum necessary" standard. 45 C.F.R. § 164.502(b)(2)(v).
- HIPAA permits disclosure of PHI for health oversight activities authorized by law. These activities include audits; civil, administrative or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative or criminal proceedings or actions; and other specified oversight activities. 45 C.F.R. § 164.512(d). Disclosures for health oversight activities are subject to the "minimum necessary" standard. *Cf.* 45 C.F.R. § 164.502(b)(2).

(3), (4), (5)

I have been unable to locate any interpretive analysis in case law or guidance published by the U.S. Department of Health and Human Services definitively clarifying which of the foregoing HIPAA exceptions best fits new Wis. Stat. § 146.82(2)(a)(22). On balance, I believe the § 164.512(a) "required by law" exception is the best fit because of the mandatory nature of the procedures LRBs0090/3 would create in new Wis. Stat. § 979.028(2). The health care operations described in connection with the § 164.506 exception seem to be more of a routine, ongoing business nature than the reviews mandated by new § 146.82(2)(a)(22). The health oversight activities described in § 164.512(d) are not "required," are of a more systemic nature, or involve a more formal tribunal.

Michael Dsida
March 9, 2005
Page 3

Which HIPAA confidentiality exception best fits the new Wis. Stat. § 146.82(2)(a)(22) disclosure matters because the 45 C.F.R. § 164.512(a) "required by law" exception is not subject to the "minimum necessary" standard. If you believe another exception better fits new § 146.82(2)(a)(22), LRBs0090/3 should be redrafted to limit the information provided to the board to the "minimum necessary." For example, the provision in new § 979.028(1) providing the board access to "all medical and prison records related to the deceased inmate" would need revision.

As an aside, somewhat related to the "minimum necessary" standard, HIPAA imposes special confidentiality protections on psychotherapy notes. HIPAA generally requires specific authorization for release of psychotherapy notes, although not for disclosures required by law. 45 C.F.R. § 164.508(a)(2)(ii). That special protection is consistent with exclusion of treatment notes from the Wis. Stat. § 51.30(1)(b) definition of "treatment records," to which the § 51.30(4)(a) confidentiality exceptions potentially apply. I think you would need to add specific statutory authorization if it is your intent that records of this nature would be available to the board, and for the other disclosures described below.

If you were to conclude that the proposed disclosures are not "required by law" but rather "health care operations" for which 45 C.F.R. § 164.506(a) and (c)(1) allows disclosure, then it would not be necessary to find specific authorization in Wis. Stat. § 146.82 for the various disclosures. As recently amended by 2003 Wis. Law 281, Wis. Stat. § 146.82(1) now allows disclosures made for purposes of health care operations as authorized under 45 C.F.R., subpart E (which includes § 164.506(a) and (c)(1)). That still would leave open the issue of disclosures of information protected by Wis. Stat. § 51.30 and other statutes, however.

Two other disclosures related to the new § 979.028 review process that you may wish to consider involve internal disclosures at DOC that would occur before referral to the board, and disclosure of the board's findings as provided in new 979.28(3) and (4).

For HIPAA purposes, I assume that DOC is a hybrid entity as defined in 45 C.F.R. § 164.103 and described in 45 C.F.R. § 164.105(a). Among other things, HIPAA requires that the health care component of a hybrid entity not disclose PHI to another component of the covered entity in circumstances where the disclosure could not occur if the health care component and the other component were separate and distinct legal entities. 45 C.F.R. § 164.105(a)(2)(ii)(A). As you consider the mechanism for providing information to the board, I'd suggest reviewing any internal disclosures that would occur inside DOC (who would make the referral and provide supporting information to the board), authorization for those disclosures under existing Wisconsin law, and alignment of those disclosures with the various HIPAA confidentiality exceptions. Again, if the internal DOC disclosures were required by law, the "minimum necessary" standard would not apply by operation of § 164.502(b)(2)(v).

Let DOC decide ↑

At the other end of the board's review, new Wis. Stat. § 979.28(3) requires the board to prepare a summary report and submit the report to specified persons. I assume that the summary report will discuss information gleaned from "patient health care records," "treatment records," etc., and so another exception in Wis. Stat. § 146.82 authorizing these further disclosures would seem to be in order—along with companion exceptions in § 51.30 and some of the other statutes excepted from the § 146.81 definition of "patient health care records." Cf. Wis. Stat. 146.82(b). The same analysis regarding the applicable HIPAA exception would apply here as to the disclosure of information to the board, discussed above. The "minimum necessary" standard would not apply if these disclosures are required by law, as the language of proposed § 979.28(3) currently provides.

New Wis. Stat. § 979.28(4) requires a slightly different analysis because some of the further disclosures permitted in that section are permissible, rather than mandatory. To the extent that disclosures are not required by law, they would seem to be made for HIPAA purposes of health care operations or health oversight activities. As discussed above, the "minimum necessary" standard applies to disclosures pursuant to those HIPAA confidentiality exceptions. It therefore might be useful to make mandatory all disclosures contemplated by this section, so that the "minimum necessary" standard would not apply to any of the disclosures. Depending on whether recommendation-related disclosures to DOC would be made back to the same DOC entities that made initial referrals to the board, it also may be necessary to consider whether additional disclosure exemptions are required in Wisconsin law.

Finally, a couple brief observations.

First, there is a HIPAA confidentiality exception specifically authorizing disclosures by covered entities to correctional institutions. 45 C.F.R. § 164.512(k)(5). This exception terminates when an inmate no longer remains in lawful custody, however, and authorizes use of PHI for various institutional operations purposes. I see no applicability of this provision to the proposals set forth in LRBs0090/3.

Second, a covered entity may disclose PHI pursuant to a HIPAA authorization complying with requirements of 45 C.F.R. § 164.508. 45 C.F.R. § 164.502(a)(1)(iv). The "minimum necessary" standard does not apply to disclosures made pursuant to a qualifying authorization. 45 C.F.R. § 164.502(b)(2)(iii). It may not be feasible to incorporate authorization provisions into LRBs0090/3, but as a practical matter securing authorization for release of information for purposes of the board's review and reporting would simplify the various disclosure issues involved. The deceased inmate's personal representative could give consent for HIPAA purposes. 45 C.F.R. § 164.502(g)(1) and (4). Similarly, both Wis. Stats. §§ 146.82(1) and 51.30(2) include provisions for record release with informed consent. Please note that HIPAA would require a separate authorization for release of psychotherapy notes. 45 C.F.R. § 164.508(b)(3)(ii) and (iii).

Michael Dsida
March 9, 2005
Page 5

This is a very complicated area of the law. I hope these comments are useful to you. Please feel free to contact me at 266-0323 or burkeme@doj.state.wi.us if I can be of further assistance.

burkeme\hipaa\dsida 030905.doc

Dsida, Michael

From: Hoey, Joseph
Sent: Wednesday, March 30, 2005 5:00 PM
To: Dsida, Michael
Subject: FW: HIPAA and Inmate and Resident Mortality Board bill

-----Original Message-----

From: Dsida, Michael
Sent: Friday, March 11, 2005 2:01 PM
To: Hoey, Joseph
Subject: RE: HIPAA and Inmate and Resident Mortality Board bill

just read the memo again, and I should clarify what I wrote about psychotherapy notes. If the bill uses the term "patient health care records," that would exclude "treatment records," which include not just psychotherapy notes, but all records relating to mental health or AODA treatment. If you want to make those records available, please let me know, and I will draft a new exception under 51.30 (4).

-----Original Message-----

From: Dsida, Michael
Sent: Thursday, March 10, 2005 11:24 AM
To: Hoey, Joseph
Subject: HIPAA and Inmate and Resident Mortality Board bill

Joe-

Mary Burke from DOJ sent me the attached memo in response to my request. It's a very thorough analysis of how HIPAA relates to this bill.

I had also come to the conclusion that disclosures mandated by the bill (including those occurring within DOC) are "required by law," but I was unaware of the special treatment given to psychotherapy notes. I can try to address that in the next version, as well as her concerns regarding the use of the term "medical records." One question that the memo raises for you relates to the first part of s. 979.028 (4). Mary suggested making it mandatory. Another option would be to specify that disclosure of inmate health care records made in the context of making recommendations or expressing concerns cannot exceed the minimum necessary.

Mike Dsida
 Legislative Reference Bureau
 608/266-9867
michael.dsida@legis.state.wi.us

-----Original Message-----

From: Burke, Mary E. - DOJ
Sent: Wednesday, March 09, 2005 4:00 PM
To: Dsida, Michael
Subject: comments on LRBs0090/3 (2003-04 Legislature)

Please let me know if you have any questions or would like to discuss.

Mary E. Burke
 Assistant Attorney General
 Wisconsin Department of Justice
 P.O. Box 7857
 Madison, WI 53707-7857
burkeme@doj.state.wi.us
 v: (608) 266-0323

3/31/2005

Dsida, Michael

From: Hoey, Joseph
Sent: Wednesday, March 30, 2005 5:01 PM
To: Dsida, Michael
Subject: FW: Additional points regarding review of inmate deaths

Follow Up Flag: Follow up
Flag Status: Flagged

-----Original Message-----

From: Dsida, Michael
Sent: Monday, February 28, 2005 4:00 PM
To: Hoey, Joseph
Subject: FW: Additional points regarding review of inmate deaths

One other question -- Sarah answered 1-5, but I'm not sure that I ever got instructions regarding no. 6 below. Maybe, since it appears to be a different kind of investigation (i.e., something other than an autopsy), you just want to ignore it for the purposes of this bill???

yes - ignore

-----Original Message-----

From: Dsida, Michael
Sent: Wednesday, October 27, 2004 3:08 PM
To: Osterberg, Sarah
Subject: Additional points regarding review of inmate deaths

Besides the question I left on your voicemail regarding the "next scheduled meeting":

1. In last year's sub, you expanded the scope of s. 979.025 (which requires autopsies for people who die in in-state or out-of-state prisons) to cover, among others, juveniles in secured correctional facilities. That change, however, did not cover juveniles who are placed in secure facilities in other states. Should it have? (I don't know how often juveniles are placed in out-of-state facilities, so I don't know how many individuals that change would cover.)
2. Sections 7 and 18 of the sub only applied to inmates/residents of in-state facilities. (Note the cross-references to s. 979.025 (1).) I assume that they should also apply to inmates (and residents, depending on how you address Item 1) who die in out-of-state facilities if there is an in-state autopsy.
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Legislative Reference Bureau
608/266-9867
michael.dsida@legis.state.wi.us

Dsida, Michael

From: Hoey, Joseph
Sent: Wednesday, March 30, 2005 5:01 PM
To: Dsida, Michael
Subject: FW: Additional points regarding review of inmate deaths

Follow Up Flag: Follow up
Flag Status: Flagged

-----Original Message-----

From: Dsida, Michael
Sent: Tuesday, March 01, 2005 12:59 PM
To: Hoey, Joseph
Subject: Additional points regarding review of inmate deaths

1. I'm not so sure about Item 2 anymore with respect to Section 7. Under current law, if a coroner or ME believes that an out-of-state inmate was the victim of a homicide, he or she notifies the appropriate authority in the other state -- not the DA. So perhaps what is in Section 7 (notice to the AG) should remain applicable only to in-state inmates. *Yes*
2. DOC is required to provide the board records regarding a death by the next scheduled meeting (page 5, line 8). But amendment 2 eliminated the quarterly meeting requirement. Any thoughts on how you want to change this?
3. The bill requires DOC to provide the board its medical records for the inmate. But the board is required to keep information from those records and other medical records it may have confidential. Do you want an exception to s. 146.82 (2) (b) to allow the board to use information in the final report? *Yes. Mike - ✓ HIPAA b/c not "reg'd by law" use "min extent nec"?*
4. Should the report be subject to the open records law? *No*
5. Amendment 4 raises a few questions. Is the board required to make a preliminary report? *No* Should that report be exempt -- at least pending the completion of the investigation -- from the open records law? *Yes* If yes, what about the records on which it is based? (The second and third questions regarding Amendment 4 may be made moot by your answer to Questions 3 and 4.) The bill does not specify how the board learns that a criminal investigation is complete. Is that okay? (Note that it's possible that for an investigation to remain open for a very long time -- for example if the DA concludes that a crime has been committed but cannot identify the perpetrator. But I assume that that situation would be very unlikely to occur in a prison.) *No*
6. The board is required to send the report to the DA or AG, "if appropriate." Is that okay? Would you rather specify the circumstances in which it sends them the report? *Yes*

-----Original Message-----

From: Dsida, Michael
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To: Osterberg, Sarah
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Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@legis.state.wi.us

**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2003 ASSEMBLY BILL 152**

August 12, 2003 - Offered by Representative WASSERMAN.

1 **AN ACT to amend** 979.025 (1), 979.05 (2), 979.05 (3), 979.05 (5), 979.05 (6), 979.06
2 (1), 979.06 (2), 979.08 (1), 979.08 (5), 979.08 (6) and 979.08 (7); and **to create**
3 15.07 (1) (b) 23., 15.07 (3) (bm) 5., 15.145 (4), 146.82 (2) (a) 22., 979.028, 979.04
4 (2m) and 979.10 (1) (a) 1m. of the statutes; **relating to:** creating a board to
5 review and make recommendations regarding deaths at correctional
6 institutions.

Analysis by the Legislative Reference Bureau

Under current law, upon the death of an inmate of a state correctional institution, the person in charge of the institution is required to notify the appropriate relative of the inmate of the death. Currently, the Department of Corrections (DOC) is also required to provide the relative with written notification that DOC, upon request, will provide the relative with a copy of any autopsy performed on the inmate or a copy of any other report or information regarding the inmate's death.

Under current law, if the district attorney has notice that the death of a person may be the result of homicide (including homicide by negligent handling of a dangerous weapon or resulting from intoxicated use of a motor vehicle) or suicide, or may have occurred under unexplained or suspicious circumstances, the district

(as well as the district attorney) and if the person dies
 attorney may order an inquest to determine the cause of the person's death. If a coroner or medical examiner has similar knowledge about a person's death, the coroner or medical examiner is required to notify the district attorney of the circumstances surrounding the death and may request that the district attorney order an inquest. The district attorney may order an inquest based on that information or may request that the coroner or medical examiner conduct a preliminary examination and report back to the district attorney. If the district attorney does not order an inquest, under current law the coroner or medical examiner may petition the circuit court to order an inquest. when such

This substitute amendment requires the coroner or medical examiner to also notify the attorney general of the death of a person in the custody of DOC who is in an institution if the death is one that would permit the district attorney to order an inquest. The bill gives the attorney general the same powers as the district attorney to order and conduct an inquest when notified of that death. upon request

The substitute amendment creates an Inmate and Resident Mortality Board composed of 12 members and attached to DOC. The board is given authority to review circumstances of the death of a person who is in the custody of DOC and who is an inmate in an in-state or out-of-state correctional institution, a county jail, or a house of corrections, or who is a resident of a secured correctional facility. Under the substitute amendment, within three days after the death of an inmate or resident, DOC must send a written notice to each member of the board of the death, and provide them with a summary of information regarding the death, including the date, time, and place of the death. DOC is also required to provide the board at its next scheduled meeting with the records that are in the custody of DOC regarding the person who died and with any information obtained as the result of DOC's internal review of the death. In addition,

Under the substitute amendment, DOC is required to provide any assistance the Inmate and Resident Mortality Board needs to review the circumstances of the death. The substitute amendment allows the board to review any medical records of the inmate or resident in the custody of a medical provider; with the approval of the district attorney or attorney general, medical records in the custody of a law enforcement agency; information obtained by the coroner or medical examiner regarding the death; and information collected as a result of the autopsy. may also

The substitute amendment requires the board to issue a report of the board's review within 30 days after the meeting at which the board completes its review of the death and to submit that report to a relative of the deceased person, to members of the appropriate standing committees of the senate and assembly, to the secretary of DOC, and to the district attorney or attorney general, if appropriate. The substitute amendment authorizes the board to make recommendations to DOC regarding medical and other prison procedures, including rules, based on the board's review of the death. If the board determines during its review of a person's death that a medical provider failed to provide appropriate, proper, and necessary medical care, that it has or mental health treatment

Beyond reviewing information from DOC,

to implement them

medical and
mental health

bill also
requires

INSB
✓

Moreover,

bill also

dies, while

member

bill

of an inmate's death

that it has

or mental health treatment

on a person confined in a state correctional institution

which is

Under the bill, if

the board must review the circumstances of the person's death

(including records)

may also

regarding its

submit to DOC

INS C ✓ bill
the board is required under the ~~substitute amendment~~ to prepare and forward a complaint to the appropriate credentialing board.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 15.07 (1) (b) 23[✓] of the statutes is created to read:

2 15.07 (1) (b) 23. The members of the inmate and resident mortality board
3 appointed under s. 15.145 (4).[✓]

4 SECTION 2. 15.07 (3) (bm) 5⁶ of the statutes is created to read:

5 15.07 (3) (bm) 5⁶. The inmate and resident mortality board shall meet at least
6 ~~4 times each year and may meet at other times~~ on the call of the chairperson or a
7 majority of the board's members.

8 SECTION 3. 15.145 (4)[✓] of the statutes is created to read:

9 15.145 (4) INMATE AND RESIDENT MORTALITY BOARD. There is created in the
10 department of corrections an inmate and resident mortality board consisting of 12
11 members appointed for 4-year terms. Eight of the members shall be appointed by
12 the governor and shall include 2 physicians from the University of Wisconsin
13 ~~Hospitals and Clinics Authority~~ ^{Medical School} 2 physicians from the Medical College of Wisconsin,
14 one physician from a health care provider other than the University of Wisconsin
15 ~~Hospitals and Clinics Authority~~ ^{Medical School} or the Medical College of Wisconsin, one registered
16 nurse employed by a private health maintenance organization, one registered nurse
17 employed by a private hospital, and one member who does not represent any of the
18 foregoing entities and who is not employed by a state agency. The other 4 members
19 of the board shall be appointed by the secretary of corrections and shall be a warden
20 of a state correctional facility, a manager of a unit within a state correctional facility
21 that provides the health services to inmates, a health care provider who is employed

1 by the department of corrections, and an employee of the department of corrections,
2 who works in a correctional facility. At least one member of the board shall be a
3 physician who is a pathologist with subspecialty training in forensic pathology and
4 who is certified by the American Board of Pathology.

5 SECTION 4. 146.82 (2) (a) 22. of the statutes is created to read:

6 146.82 (2) (a) 22. To the inmate and resident mortality board to enable ~~that~~ ^{it}
7 board to review the death of an inmate or resident under s. 979.028.

8 SECTION 5. 979.025 (1) of the statutes is amended to read:

9 979.025 (1) INMATE OR RESIDENT CONFINED TO AN INSTITUTION IN THIS STATE. If an
10 individual ^{dies while} ~~dies while he or she is~~ in the legal custody of the department and confined
11 to a state correctional facility located in this state institution, as defined s. 301.01 (4), ⁱⁿ
12 but excluding any institution that meets the criteria under s. 302.01 solely because
13 of its status under s. 301.046 or 301.048 (4) (b) or is confined to a county jail or house
14 of correction pursuant to a contract under s. 302.27, the coroner or medical examiner
15 of the county where the death occurred shall perform an autopsy on the deceased
16 individual. If the coroner or medical examiner who performs the autopsy determines
17 that the individual's death may have been the result of any of the situations that
18 would permit the district attorney to order an inquest under s. 979.04 (1) the coroner
19 or medical examiner shall follow the procedures under s. 979.04 (2) or (2m).

20 SECTION 6. 979.028 of the statutes is created to read:

21 **979.028 Review of an inmate's or resident's death.** (1) The inmate and
22 resident mortality board shall review the circumstances of the death of every
23 individual who is subject to an autopsy under s. 979.025. To facilitate the review, the
24 board shall have access to all medical and prison records related to the deceased
25 inmate. A member of the board shall disqualify himself or herself from any

1 discussion regarding a specific death if he or she determines that he or she cannot
2 act in an impartial manner regarding that death.

3 ³ (2) (a) Within 3 business days, as defined in s. 421.301 (6), after the death of
4 a person whose death requires the performance of an autopsy under s. 979.025, the
5 secretary of corrections or the secretary's designee shall send a written notice to
6 every member of the inmate and resident mortality board of the death. The written
7 notification shall include a summary of information related to the person's death,
8 including the date, time, and place of the death. At the next scheduled meeting of

9 the board, the department shall provide the ^{member} board with the records that are in the
10 custody of the department regarding the person who died, including ~~medical~~ records,
11 and any information obtained as a result of any departmental internal review of the
12 death. At the request of any board member, the department shall provide the
13 member with the records and information obtained as a result of any internal review
14 before the next scheduled meeting of the board. ^{patient health care and treatment}

15 (b) The department shall cooperate with the board and provide any assistance
16 the board requests to review the circumstances of the death of the inmate or resident.

17 The board, while performing its duties, may review medical records of the inmate or
18 resident in the custody of any medical provider; with the approval of the district
19 attorney or attorney general, medical records in the custody of a law enforcement
20 agency; information obtained by the coroner or medical examiner regarding the
21 death of the inmate or resident; and any information collected as the result of an
22 autopsy performed under s. 979.025 or an inquest ordered under s. 979.04.

23 ⁴ (3) Within 30 days after the meeting during which the board completes its
24 review of an inmate's or resident's death, the inmate and resident mortality board

(a) Except as provided in sub ⁵ (4),

shall prepare a summary report of the board's review of ^{the} an inmate's or resident's death and submit that summary report to all of the following:

(a) The appropriate relative of the deceased.

(b) The secretary of corrections.

(c) If appropriate, the attorney general or district attorney.

(d) Notwithstanding s. 13.172 (3), the chairperson and the ranking minority member of the appropriate standing committee of the assembly and senate.

(4) The inmate and resident mortality board ^{shall} ~~may~~ make recommendations to the department regarding medical and other prison procedures, based on the board's review of an inmate's or resident's death. The board ^{shall} ~~may~~ also refer concerns or recommendations to the department related to the performance ^{of staff, including} ~~or work rules~~ violations ^{by} ~~regarding~~ staff who ^{of} ~~did not follow~~ departmental policies ^{STEP ↑} ~~or~~ procedures related to the circumstances surrounding the death. The inmate and resident mortality board shall prepare and forward a complaint to the appropriate credentialing board, as defined in s. 440.01 (2) (bm), if, during the board's review of an inmate's or resident's death, the board determines that a medical provider failed to provide the appropriate, proper, and necessary medical care.

SECTION 7. 979.04 (2m) of the statutes is created to read:

979.04 (2m) If the coroner or medical examiner has knowledge of the death of any inmate or resident under s. 979.025 (1) that would permit the district attorney to order an inquest under s. 979.04 (1), he or she shall notify the attorney general in addition to the notification to the district attorney. The notification shall include information concerning the circumstances surrounding the death. The attorney general shall have the same powers and authority to order an inquest when notified of a death under this subsection as has the district attorney under sub. (1).

1 Subsequent to receipt of notice of the death, the attorney general may request the
2 coroner or medical examiner to conduct a preliminary investigation and report back
3 to the attorney general. The attorney general may determine the scope of the
4 preliminary investigation. This subsection does not limit or prevent any other
5 investigation into the death by any law enforcement agency with jurisdiction over
6 the investigation. The coroner or medical examiner may request the attorney
7 general to order an inquest. If the attorney general refuses to order the inquest, and
8 the district attorney has refused to order an inquest under sub. (1), the coroner or
9 medical examiner may petition the circuit court to order an inquest. The court may
10 issue the order if it finds that the attorney general has abused his or her discretion
11 in not ordering an inquest.

12 **SECTION 8.** 979.05 (2) of the statutes is amended to read:

13 979.05 (2) The inquest shall be conducted before a jury unless the attorney
14 general, district attorney, coroner, or medical examiner requests that the inquest be
15 conducted before the judge or circuit court commissioner only. If the inquest is to be
16 conducted before a jury, a sufficient number of names of prospective jurors shall be
17 selected from the prospective juror list for the county in which the inquest is to be
18 held by the clerk of circuit court in the manner provided in s. 756.06. The judge or
19 circuit court commissioner conducting the inquest shall summon the prospective
20 jurors to appear before the judge or circuit court commissioner at the time fixed in
21 the summons. The summons may be served by mail, or by personal service if the
22 judge, circuit court commissioner, attorney general, or district attorney determines
23 personal service to be appropriate. The summons shall be in the form used to
24 summon petit jurors in the circuit courts of the county. Any person who fails to
25 appear when summoned as an inquest juror is subject to a forfeiture of not more than

1 \$40. The inquest jury shall consist of 6 jurors. If 6 jurors do not remain from the
2 number originally summoned after establishment of qualifications, the judge or
3 circuit court commissioner conducting the inquest may require the clerk of the circuit
4 court to select sufficient additional jurors' names. Those persons shall be summoned
5 forthwith by the sheriff of the county.

6 **SECTION 9.** 979.05 (3) of the statutes is amended to read:

7 979.05 (3) The judge or circuit court commissioner shall examine on oath or
8 affirmation each person who is called as a juror to discover whether the juror is
9 related by blood, marriage, or adoption to the decedent, any member of the decedent's
10 family, the attorney general, district attorney, any other attorney appearing in the
11 case, or any members of the office of the attorney general, district attorney, or of the
12 ~~office of any other attorney appearing in the case, has expressed or formed any~~
13 opinion regarding the matters being inquired into in the inquest or is aware of or has
14 any bias or prejudice concerning the matters being inquired into in the inquest. If
15 any prospective juror is found to be not indifferent or is found to have formed an
16 opinion which cannot be laid aside, that juror shall be excused. The judge or circuit
17 commissioner may select one or more alternate jurors if the inquest is likely to be
18 protracted. This subsection does not limit the right of the attorney general or district
19 attorney to supplement the judge's or circuit commissioner's examination of any
20 prospective jurors as to qualifications.

21 **SECTION 10.** 979.05 (5) of the statutes is amended to read:

22 979.05 (5) Prior to the submission of evidence to the jury, the judge or circuit
23 court commissioner may instruct the jury on its duties and on the substantive law
24 regarding the issues which may be inquired into before the jury. The attorney
25 general or district attorney may, at any time during the course of the inquest, make

1 statements to the jury relating to procedural or evidentiary matters he or she and
2 the judge or circuit court commissioner deem appropriate. Section 972.12 applies to
3 the conduct of the inquest jury.

4 **SECTION 11.** 979.05 (6) of the statutes is amended to read:

5 979.05 (6) The judge or circuit court commissioner conducting the inquest may
6 order that proceedings be secret if the attorney general or district attorney so
7 requests or concurs.

8 **SECTION 12.** 979.06 (1) of the statutes is amended to read:

9 979.06 (1) The judge or circuit court commissioner may issue subpoenas for
10 witnesses at the request of the coroner or medical examiner and shall issue
11 subpoenas for witnesses requested by the attorney general or district attorney.
12 Subpoenas are returnable at the time and place stated ~~therein~~ in the subpoena.
13 Persons who are served with a subpoena may be compelled to attend proceedings in
14 the manner provided in s. 885.12.

15 **SECTION 13.** 979.06 (2) of the statutes is amended to read:

16 979.06 (2) The judge or circuit court commissioner conducting the inquest and
17 the attorney general or district attorney may require by subpoena the attendance of
18 one or more expert witnesses, including physicians, surgeons and pathologists, for
19 the purposes of conducting an examination of the body and all relevant and material
20 scientific and medical tests connected with the examination and testifying as to the
21 results of the examination and tests. The expert witnesses so subpoenaed shall
22 receive reasonable fees determined by the attorney general or district attorney and
23 the judge or circuit court commissioner conducting the inquest.

24 **SECTION 14.** 979.08 (1) of the statutes is amended to read:

1 979.08 (1) When the evidence is concluded and the testimony closed, the judge
2 or circuit court commissioner shall instruct the jury on its duties and on the
3 substantive law regarding the issues inquired into before the jury. The attorney
4 general or district attorney shall prepare a written set of appropriate requested
5 instructions and shall submit them to the judge or circuit court commissioner who,
6 together with the attorney general or district attorney, shall compile the final set of
7 instructions which shall be given. The instructions shall include those criminal
8 offenses for which the judge or circuit court commissioner believes a reasonable jury
9 might return a verdict based upon a finding of probable cause.

10 SECTION 15. 979.08 (5) of the statutes is amended to read:

11 979.08 (5) The verdict delivered by the inquest jury is advisory and does not
12 preclude or require the issuance of any criminal charges by the attorney general or
13 district attorney.

14 SECTION 16. 979.08 (6) of the statutes is amended to read:

15 979.08 (6) Any verdict so rendered, after being validated and signed by the
16 judge or circuit court commissioner, together with the record of the inquest, shall be
17 delivered to the district attorney for consideration. After considering the verdict and
18 record, the attorney general or district attorney may deliver the entire inquest record
19 or any part thereof to the coroner or medical examiner for safekeeping.

20 SECTION 17. 979.08 (7) of the statutes is amended to read:

21 979.08 (7) The record of a secret inquest proceeding shall not be open for
22 inspection unless so ordered by the judge or circuit court commissioner conducting
23 the inquest upon petition by the attorney general or district attorney.

24 SECTION 18. 979.10 (1) (a) 1m. of the statutes is created to read:

INS ✓
10/24

on this state
or it was
1 979.10 (1) (a) 1m. If an autopsy is performed under s. 979.025 (1), the coroner
2 or medical examiner who performed the autopsy; or

3 **SECTION 19. Nonstatutory provisions.**

4 (1) Notwithstanding the length of terms for the members of the inmate and
5 resident mortality board specified in section 15.145 (4) of the statutes, as created by
6 this act, 3 initial members of the board appointed by the governor and 2 initial
7 members appointed by the secretary of corrections shall be for a term of 4 years; 3
8 initial members of the board appointed by the governor and one initial member
9 appointed by the secretary of corrections shall be for a term of 3 years; and 2 initial
10 members of the board appointed by the governor and one initial member appointed
11 by the secretary of corrections shall be for a term of 2 years.

12 (END)

**2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0585/lins
MGD:.....

analysis INSERT A1

Under current law, if a person dies while confined in a correctional facility, the coroner or medical examiner for the county where the death occurred must conduct an autopsy. In addition,

analysis INSERT A2

Separately, current law establishes procedures for inquests, which apply to inmates and non-inmates alike.

analysis INSERT B

This bill expands the scope of the provision requiring autopsies for persons who die while confined in a state correctional facility so that it applies to a person in DOC's custody who dies while temporarily confined in, and under a DOC contract with, a county jail or house of correction. In addition, the bill

analysis INSERT C

Meetings of the Inmate and Resident Mortality Board are not subject to the Open Meetings Law. Records prepared by the board are not subject to the Open Records Law.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

INSERT 4/4B

SECTION 1. 51.30 (4) (b) 23g. of the statutes is created to read:

51.30 (4) (b) 23g. To the inmate and resident mortality board to enable it to review the death of an inmate or resident under s. 978.028.

SECTION 2. 51.30 (4) (b) 23r. of the statutes is created to read:

51.30 (4) (b) 23r. By the inmate and resident mortality board under s. 979.028 (3), (4), or (5).

INSERT 4/7

SECTION 3. 146.82 (2) (a) 23. of the statutes is created to read:

146.82 (2) (a) 23. By the inmate and resident mortality board under s. 979.028 (3), (4), or (5). The board is not required to receive a request ~~in order~~ to release patient health care records under this subdivision.

INSERT 4/21

In this section:

(a) "Patient health care records" has the meaning given in s. 146.81 (4). ✓

(b) "Treatment records" has the meaning given in s. 51.30 (1) (b). ✓

✓ (2)

INSERT 5/17 ⁶

(b) 1. If the board, while performing its duties, requests patient health care or treatment records that are in the custody of a health care provider, as defined in s. 146.81 (1), ✓ the department of health and family services, a county department under s. 51.42 ✓ or 51.437 ✓ or its staff, or a treatment facility, as defined in s. 51.01 (19), ✓ the records shall be provided to the board for its review.

2. If the board, while performing its duties, requests patient health care or treatment records that are in the custody of a law enforcement agency, the agency shall provide the records to the board for its review, but only with the approval of the district attorney or attorney general.

3. Upon request by the board, a coroner or medical examiner shall provide the board any information that it has obtained regarding the death of the inmate or resident. The board may also review any information collected through any of the following:

a. An autopsy performed under s. 979.025. ✓

b. An inquest ordered under s. 979.04 ✓ if the inquest is not secret under s. 979.05 (6). ✓

c. A secret inquest if a judge or circuit court commissioner has authorized the board to inspect the record of the inquest under s. 979.08 (7). ✓

INSERT 6/7A

(b) The board may include patient health care or treatment records in a report prepared under par. (a), but only to the minimum extent necessary to summarize its conclusions regarding the inmate's or resident's death.

INSERT 6/18

¹
⑤ (b) Subchapter V of ch. 19 does not apply to meetings of the inmate and resident mortality board. Records prepared under this section are not subject to inspection or copying under s. 19.35 (1).

~~SECTION 4.~~ 979.04 (1) of the statutes is amended to read:

979.04 (1) If the district attorney has notice of the death of any person and there is reason to believe from the circumstances surrounding the death that felony murder, first-degree or 2nd-degree intentional homicide, first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, homicide by negligent operation of vehicle, homicide resulting from negligent control of a vicious animal or homicide by intoxicated user of a vehicle or firearm may have been committed, or that death may have been due to suicide or unexplained or suspicious circumstances, the district attorney may order that an inquest be conducted for the purpose of inquiring how the person died. The district attorney shall appear in any such inquest representing the state in presenting all evidence which may be relevant or material to the inquiry of the inquest. The inquest may be held in any county in this state in which venue would lie for the trial of any offense charged as the result of or involving the death. An inquest may only be ordered by the district attorney under this subsection, by the attorney general under sub. (2) (b), or by the circuit judge under sub. (2) (d).

1 **SECTION 5.** 979.04 (2) of the statutes is renumbered 979.04 (2) (a) and amended
2 to read:

3 979.04 (2) (a) If the coroner or medical examiner has knowledge of the death
4 of any that a person has died in the manner described under sub. (1), he or she shall
5 immediately notify the district attorney. The

6 (c) A notification given by a coroner or medical examiner under par. (a) or (b)
7 shall include information concerning the circumstances surrounding the death.

8 (d) The coroner or medical examiner may request the district attorney, if
9 notified under par. (a) or (b), or the attorney general, if notified under par. (b) to order
10 an inquest under sub. (1). If the district attorney refuses and, in cases involving an
11 inmate or resident to whom s. 979.025 (1) applies, the attorney general refuse to
12 order the inquest, a coroner or medical examiner may petition the circuit court to
13 order an inquest. The court may issue the order if it finds that the district attorney
14 has and, in cases involving an inmate or resident to whom s. 979.025 (1) applies, the
15 attorney general, have abused his or her discretion in not ordering an inquest.

History: 1983 a. 279; 1985 a. 135; 1987 a. 399.

16 ~~SECTION 6.~~ 979.04 (2) (b) of the statutes is created to read:

17 979.04 (2) (b) If the coroner or medical examiner has knowledge that a person
18 to whom s. 979.025 (1) applies has died in the manner described under sub. (1), the
19 coroner or medical examiner shall immediately notify the district attorney and the
20 attorney general. When notified of a death under this paragraph, the attorney
21 general shall have the same powers and duties that a district attorney has with
22 respect to an inquest.

23 **INSERT 10/24**

24 ~~SECTION 7.~~ 979.08 (7) of the statutes is amended to read:

1 979.08 (7) The record of a secret inquest proceeding shall not be open for
2 inspection unless so ordered by the judge or circuit court commissioner conducting
3 the inquest upon petition by the district attorney.

History: 1983 a. 279; 2001 a. 61.

4 **SECTION 8.** 979.10 (1) (a) 2. of the statutes is amended to read:

5 979.10 (1) (a) 2. The Unless an autopsy is required under s. 979.025 (1), the
6 coroner or medical examiner in the county where the event which caused the death
7 occurred if the death occurred in this state and if the death is the subject of an
8 investigation under s. 979.01; or

History: 1971 c. 164 s. 86; 1973 c. 272; 1979 c. 177; 1983 a. 146; 1983 a. 279 s. 20; Stats. 1983 s. 979.10; 1985 a. 315; 2001 a. 104.

a case in which the circumstances of

or, in a ^{person's} death ^{are} reviewed under s. 979.028,

the inmate and resident mortality board

These go into -0585/1 ins
at page 5

979.09

AM

979.09 Burial of body. If any judge or circuit court commissioner conducts an inquest as to the death of a stranger or of a person whose identity is unknown or whose body is unclaimed or if the district attorney determines that no inquest into the death of such a person is necessary and the circuit judge has not ordered an inquest under s. 979.04 (2), the coroner or medical examiner shall cause the body to be decently buried or cremated and shall certify to all the charges incurred in taking any inquest by him or her and to the expenses of burial or cremation of the dead body. The charges and expenses shall be audited by the county board of the proper county and paid out of the county treasury.

INSECT
X

979.10(2)

AM

(2) If a corpse is to be cremated, the coroner or medical examiner shall make a careful personal inquiry into the cause and manner of death, and conduct an autopsy or order the conducting of an autopsy, if in his or her or the district attorney's opinion it is necessary to determine the cause and manner of death. If the coroner or medical examiner determines that no further examination or judicial inquiry is necessary he or she shall certify that fact. Upon written request by the district attorney the coroner or medical examiner shall obtain the concurrence of the district attorney before issuing the certification. If the coroner or medical examiner determines that further examination or judicial inquiry is necessary, he or she shall notify the district attorney under s. 979.04 (2).

INS Y

(a)

(c)

Section #

**ASSEMBLY AMENDMENT 4,
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2003 ASSEMBLY BILL 152**

October 21, 2003 - Offered by Representative ALBERS.

1 At the locations indicated, amend the substitute amendment as follows:

2 1. Page 5, line 23: delete "Within" and substitute "Except as provided in sub.
3 (3m), within".

4 2. Page 6, line 7: after that line insert:

5 ⁰⁵
6 ^u (3m) If there is a criminal investigation of an inmate's or resident's death, the
7 board may not issue a final report ^{under sub (3) 4} regarding the board's review of the inmate's or
8 resident's death until after that criminal investigation is completed. Any report
9 issued before completion of the criminal investigation is preliminary and is subject
10 to modification based on information received as a result of the criminal
11 investigation.

(END)

**ASSEMBLY AMENDMENT 2,
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2003 ASSEMBLY BILL 152**

INS 4/4A

October 9, 2003 - Offered by Representatives WASSERMAN and ALBERS.

1 At the locations indicated, amend the substitute amendment as follows:

2 1. Page 3, line 4: delete lines 4 to 7.

3 2. Page 4, line 4: after that line insert:

4 *Please fix comp.* SECTION ~~3m~~[#] 20.916 (9) (f) 1. of the statutes, as affected by 2003 Wisconsin Act

5 33, is amended to read:

6 20.916 (9) (f) 1. Scheduled air travel. Reimbursement for air travel shall be
7 limited to the lowest appropriate airfare, as determined by the director of the office
8 of state employment relations. An employee may be reimbursed for air travel at a
9 rate other than the lowest appropriate airfare only if the employee submits a written
10 explanation of the reasonableness of the expense. Members of the inmate and
11 resident mortality board may not receive reimbursement for air travel.

12

(END)

**ASSEMBLY AMENDMENT 1,
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2003 ASSEMBLY BILL 152**

September 10, 2003 – Offered by Representative WASSERMAN.

At the locations indicated, amend the substitute amendment as follows:

1. Page 4, line 1: delete lines 1 and 2 and substitute "by the department of corrections, and a correctional officer who shall be from a list provided to the secretary by the labor organization recognized or certified to represent the employees in the collective bargaining unit that represents correctional officers. At least one member of the board shall be a

(END)

Northrop, Lori

From: Hoey, Joseph
Sent: Wednesday, May 18, 2005 9:15 AM
To: LRB.Legal
Subject: Draft review: LRB 05-0585/1 Topic: Inmate and resident mortality board

It has been requested by <Hoey, Joseph> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-0585/1 Topic: Inmate and resident mortality board